Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term, 1996

TERRY KIRKLAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 3, 1997

39 pp

QUESTIONS PRESENTED FOR REVIEW

POINT I: **IS PETITIONER ENTITLED TO RELIEF FROM SENTENCING ON GROUND THAT SENTENCING COURT INAPPROPRIATELY FAILED TO GROUP COUNTS INVOLVING RECEIVING, TRANSPORTING, REPRODUCING AND POSSESSING VISUAL DEPICTIONS INVOLVING THE USE OF A MINOR WHERE THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS AS TO WHO IS THE PRIMARY VICTIM UNDER 18 U.S.C.§ 2252 AND U.S.S.G.§ 3D1.2?**

POINT II: **IS PETITIONER ENTITLED TO RELIEF FROM SENTENCING WHERE THE SENTENCING COURT INACCURATELY CHARACTERIZED THE CHILD PORNOGRAPHY OFFENSE AS ONE INVOLVING "DISTRIBUTION" AS DEFINED IN § 2G2.2(b)(2) OF THE UNITED STATES SENTENCING GUIDELINES?**

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Terry Kirkland respectfully prays that a writ of certiorari issue to review the final judgment entered by the United States Court of Appeals for the Sixth Circuit on February 20, 1997, timely petition for rehearing denied on April 4, 1997.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. (App. 1) The order denying petitioner's petition for rehearing with suggestion for rehearing *en banc* is unreported. (App. 13) Both Decisions are reproduced in the appendix hereto.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 20, 1997. The order denying rehearing was entered on April 4, 1997. This petition for writ of certiorari was filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Certain activities relating to material involving the sexual exploitation of minors.

18 U.S.C. § 2252
(a) Any person who-
(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails,

anyvisual depiction, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any depiction that has been transported or shipped in interstate of foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

U.S.S.G. § 2G2.2

(a) Base Offense Level: 15

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.

(2) If the offense involved distribution, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but

in no event by less than 5 levels.

(3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(c) Cross Reference

(1) if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Prostitution) if the resulting offense level is greater than that determined above.

Groups of Closely Related Counts

U.S.S.G § 3D1.2

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm with in the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense

behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.3, 2B4.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 1D1.13;
§§2E4.1, 2E5.1;
§§2F1.1, 2F1.2;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.6, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:
all offenses in Chapter Two, Part A;
§§2B2.1, 2B2.3, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.2, 2G2.1;
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines(including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Determining the Combined Offense Level

U.S.S.G § 3D1.4
The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 ½	add 1 level
2	add 2 levels
2 ½ - 3	add 3 levels
3 ½ - 5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

V. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

Petitioner was named in a twelve count Indictment filed in the United States District Court for the Middle District of Tennessee,

Nashville Division, on April 26, 1995.

The Petitioner entered a plea of guilty to all twelve counts of the Indictment.

On January 26, 1996, at sentencing, the district court ruled against Petitioner on the grouping and distribution issues. Further, the district court sentenced Petitioner to serve thirty-four (34) months of incarceration in the custody of the Bureau of Prisons. Defendant Kirkland remains incarcerated.

On January 31, 1996, Defendant Kirkland filed his notice of appeal to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1291 challenging the sentence imposed by the district court. On February 20, 1997, the Sixth Circuit affirmed the ruling of the District Court even though the record is devoid of any evidence to show that there was a victim other than society. The Sixth Circuit, following the reasoning of the Eighth Circuit, found that each child depicted in the videos that the petitioner received, transported or possessed constituted a different victim. However, there is no evidence that Petitioner ever directly manipulated or sexually exploited any child.

The Sixth Circuit also misinterpreted the definition of

"distribution" for pecuniary gain by affirming the finding that Petitioner's mere possession of these tapes constituted pecuniary gain.

VI. REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit Erred In Its Application Of The United States Sentencing Guidelines By Failing To Group All Counts Of Conviction And, In So Doing, Essentially Allowed The Government To Set The Parameters Of Punishment, A Result Prohibited By Law And Policy.

United States Sentencing Guideline §3D1.2 provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Within the meaning of the rule, counts involve substantially the same harm when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan". U.S.S.G. §3D1.2(b). Although §3D1.2 specifically lists certain offenses that should and should not be grouped, the guideline under which Petitioner was sentenced, §2G2.2, is not included in either list. The guideline explains that "[f]or multiple counts that are not listed, grouping under this subsection may or may not be appropriate" as

determined on a case-by-case basis. U.S.S.G. §3D1.2. Two competing policy considerations underlie the United States Sentencing Guidelines relating to multiple counts. On one hand, the Sentencing Commission sought to increase punishment when multiple counts accurately represented significant additional criminal conduct. (See U.S.S.G. Ch. 3, Part D in the Introductory Comments). On the other hand, the Sentencing Commission desired to "limit the significance of the formal charging decision to prevent multiple punishment for substantially identical offense conduct." Both law and policy mandate that counts 1-12 of the Indictment against Petitioner be grouped for sentencing purposes.

Counts 1-12 of the Indictment against Petitioner (receiving, transporting, reproducing, and possessing visual depictions involving the use of a minor engaging in sexually explicit conduct) all arise out of 18 U.S.C. §2252. All counts involve substantially the same harm; all counts involve the same victim and all counts constitute part of a common plan or scheme. To not group all twelve counts in the Indictment against Petitioner would be to impose multiple punishments for substantially identical offense conduct and to attach great significance to the government's formal charging decision--

essentially allowing the government, and not the Sentencing Commission or the Court, to set the parameters of punishment.

The Fourth Circuit has specifically identified the "victim" sought to be protected under 18 U.S.C. §2252. United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990). In Toler, the Fourth Circuit upheld the lower court's decision not to group interstate transportation of child pornography, 18 U.S.C. §2252, with interstate transportation of a minor with intent to engage in prohibited sexual conduct, 18 U.S.C. §2423, even though the same minor was depicted in the photographs as well as taken on the interstate trip. The court held that the two offenses involved different primary victims because the primary interest of §2423 is to protect the child while "the primary victim under section 2252(a) is society in general, with the minor a secondary victim." Toler, 901 F.2d at 403. Examination of §2252 and its legislative history demonstrate that "its primary focus . . . is the harm to the moral fabric of society at large." Id. As stated in the Toler court's analysis, a distinction exists between directly manipulating the behavior of a child and transporting visual depictions of that same child. The level of culpability and directness of harm are entirely different. Petitioner did not directly manipulate

or sexually exploit any child; therefore, the primary victim under all of the counts charged against Petitioner, pursuant to §2252, is society as a whole. Paragraph 43 of the Presentence Report even concedes that "[i]n this case society at large is the most readily identifiable victim" with additional minor victims. Application Note 2 of §3D1.2 explains that "[t]he term 'victim' is not intended to include indirect or secondary victims." A grouping determination under §3D1.2 must only look to the primary victim of the offense. The primary victim of all the 18 U.S.C. §2252 counts brought against Petitioner is society. Further, all acts constituted part of a common scheme or plan. Petitioner's plan, as described in uncontroverted testimony at the January 26, 1996 Sentencing Hearing, was to provide a service for individuals seeking to meet and, sometimes, to trade pornographic materials. The Indictment in this case is based on Petitioner's role as a conduit in the trade of pornographic materials. All twelve counts involved substantially the same harm because they involved the same victim (society) and two or more acts or transactions (the receipt, transport, and reproduction of child pornographic materials) constituting part of a general scheme or plan (to provide a service for individuals trading pornographic materials).

Therefore, under the reasoning of U.S.S.G. §3D1.2(b) and Application Note 2, counts 1-12 should be grouped.

The Toler reasoning was adopted by the Sixth Circuit when it determined that six counts, based on five phone calls and the mailing of a letter over the course of a two-week period, all in an effort to obtain murder for hire of defendant's wife, should be grouped for purposes of sentence calculation. United States v. Wilson, 920 F.2d 1290, 1294 (6th Cir. 1990). Even though the six counts involved six separate and distinct acts, the counts were grouped for sentencing purposes, based on the fact that all acts involved the same victim and constituted part of a common scheme or plan.

The Sixth Circuit failed to consider the fact that Petitioner never manipulated any of the children depicted in the tapes. By ignoring this critical fact, the Sixth Circuit misses the true intent of U.S.S.G. § 3D1.2 and further splits the circuits on this issue. Petitioner was merely a conduit for such tapes and not an actual manipulator of the children in such tapes. Although the Sixth Circuit is correct in stating the legislature's intent was that the children in such videos would be the victim, Petitioner asserts that intent was

meant for cases in where the defendant directly manipulated the child depicted. Petitioner would state that where, as here, the defendant was but a "go between" for such material it is society as a whole who is the primary victim of such actions since there is not identifiable victim other than a nameless child.

Charge Manipulation

In refusing to group the counts of the Indictment, the district court, perhaps unwittingly, attached so much weight to the government's formal charging decision that it essentially allowed the government, not the Sentencing Commission or the Court, to set the parameters of the punishment. This so-called "charge manipulation" by the government, which results when a court fails to group counts involving the same victim and constituting part of a common plan or scheme, is prohibited by law and policy.

In 1990, the Sixth Circuit touched on the issue of charge manipulation as it relates to grouping. United States v. Wilson, 920 F.2d 1290. The defendant was originally sentenced to seventy-two months in prison after pleading guilty to six counts of using an interstate commerce facility in an attempt to have his wife killed. Id. at 1291. In the appeal of the sentence, the court held that the six

counts should have been grouped. Id. at 1294. The court noted that "[a]n important objective of [U.S.S.G.] Section 3D1.2 is to limit the significance of the prosecutor's charging decision to prevent multiple punishment where there is one victim and two or more acts in furtherance of a common criminal objective." Id. at 1294. In 1991, the Tenth Circuit applied the Sixth Circuit's reasoning to a case where the defendant insisted that the charges for which he was found guilty be grouped. United States v. Norman, 951 F.2d 1182, 1184 (10th Cir. 1991). The Tenth Circuit quoted with approval the above-noted excerpt from Wilson and found that the charges should have been grouped. Id. at 1186.

The Third Circuit has offered a compelling argument against charge manipulation and, although the issue of grouping was not addressed in the opinion, later courts have applied the Third Circuit's rationale to the issue of grouping. United States v. Lieberman, 971 F.2d 989 (3rd Cir. 1992); E.g., United States v. Quigley, 816 F. Supp. 1217 (6th Cir. 1993). In Lieberman, the government challenged the district court's two-level downward departure for manipulation of charges. Id. at 989. The defendant was charged with bank embezzlement, in violation of 18 U.S.C. § 656 and 18

U.S.C. § 2, and attempted income tax evasion, in violation of 26 U.S.C. § 7201. Id. at 991. In sentencing the defendant, the district court inter alia departed downward from the Guidelines calculation in the presentence report by two levels. Id. at 992. The court reasoned that the prosecution had inappropriately manipulated the indictment. Id. at 992. Following precedent, the district court premised its decision on an "applicable counterpart in the Guidelines," namely, a policy statement in the Introduction which states that "the Sentencing Commission 'recognized that a charge offense system has drawbacks' and that a 'sentencing court may control any inappropriate manipulation of the indictment through its use of departure power'." Id. at 998 (quoting U.S.S.G., Ch. 1, Pt. A, (4)(a), Policy Statement). The court qualified the term "inappropriate" so as not to imply that it meant "bad intent on the part of the prosecutor." Id. at 998. The court did say that the term "can apply to prosecutorial zeal." Id. at 998. With the intent of the legislature in mind, the court said, "[i]f we were to hold that judges have no authority to depart on this basis, it would raise the prosecutor to a position supreme over the district judge vis-a-vis sentencing by virtue of the uncontrolled charging discretion." Id. at

998. In fact, as footnote 9 indicates, [t]he Commission specifically stated that the 'most important' drawback of the charge offense system is 'the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment'." Id. at 998 n.9 (quoting U.S.S.G. Ch. 1, Pt.A,(4)(a), Policy Statement).

The way for the judiciary to avoid charge manipulation altogether is to group counts. United States v. Quigley, 816 F.Supp. 1217 (6th Cir. 1993). In 1993 the Sixth Circuit held that "[t]he executive branch, through its agent prosecutors, has great discretion in determining what to charge. When those charges are brought pursuant to the Guidelines, the judiciary may guard against the abuse of that discretion through the grouping of offenses." Id. at 1225. The Quigley court cites the excerpts from Lieberman already mentioned and in so doing indicates its shared opinion that failure to group offenses when possible attaches too much significance to the government's formal charging decision and leads to charge manipulation. Id. at 1225 n.13.

In the instant case, the district judge's decision not to group all twelve counts in the Indictment against Mr. Kirkland resulted in an inappropriate, overstated increase of his base offense level. As it

stands, the sentence reflects the prosecutor's idea of the appropriate sentence for Mr. Kirkland. Moreover, Mr. Kirkland's present sentence infringes on the "important objective" of the U.S.S.G. referred to in Wilson which seeks to "limit the significance of the prosecutor's charging decision." Id. at 1294.

B. The Sixth Circuit Erred in its Application of the Definition of "Distribution" for Pecuniary Gain under U.S.S.G. § 2G2.2(b)(2).

U.S.S.G. § 2G2.2(b)(2), Commentary Application Note 1 states: "'Distribution,' as used in this guideline, includes any act related to distribution for pecuniary gain, including ... possession with intent to distribute." (emphasis added). During the January 26, 1996 Sentencing Hearing, the government advanced two theories designed to suggest that Petitioner was involved in distribution for "pecuniary gain". They were: (1) that Petitioner's hobby, The Letter, realized some pecuniary gain from his trade of pornographic materials, and ; (2) that mere possession of child pornography showed a pecuniary gain. Both theories fail as a matter of fact.

At the Sentencing Hearing, Petitioner testified that he started The Letter five or six years ago as "a hobby." He said that he did not consider The Letter a business and that he never made any profit

from the publication or distribution of The Letter. Petitioner stated that he "never spent more than ten, fifteen minutes a day on it maximum." Further, the Presentence Investigation Report reveals that "the defendant's employment history has been exclusively related to the field of music." At the time of the investigation, Petitioner was employed full-time by the Lorenz Publishing Corporation as a music editor/composer and earned a $36,600 yearly salary. Nothing in the Presentence Investigation Report or in the testimony elicited during the January 26th Sentencing Hearing contradicts Petitioner's assertions that The Letter was a non-profit hobby.

The government did present testimony at the Sentencing Hearing, through Inspector Dirmeyer, of the United States Postal Inspection Service, that child pornography tapes have monetary value. Inspector Dirmeyer also testified that, in his opinion, one of the videotapes found in Petitioner's possession had a value of $200.00. Petitioner testified, however, that he never received any compensation for acting as a conduit in these video trades and that he never sold child pornography. On cross-examination, Petitioner testified that he would sometimes duplicate the videotapes he

received for trade prior to sending them to their destination. He testified that he did so "to have [them] ready to trade with someone else possibly in the future." In regard to the videotapes of child pornography found in his possession, Petitioner testified that he "was not collecting the child pornography...Every tape that came to [him] came from someone to send to someone else. [He is] not interested in child pornography."

The government relies on United States v. Stanton, 973 F.2d 608 (8th Cir. 1992), to support its argument that mere possession of the videotapes evidences pecuniary gain. In that case, however, the defendant admitted that he intended to resell the child pornography magazines that he possessed. In the instant case, Petitioner was not in the business of selling tapes containing child pornography. As stated in paragraph 12 of the Presentence Report, Kirkland acted only as a "go-between" for others and did not distribute for pecuniary gain. The fact that the Defendant was not involved in "distribution for pecuniary gain" is further reinforced in paragraphs 20 through 23 of the Presentence Report which reveal that Petitioner sent the video entitled "Shower Boy" to the undercover Postal Inspector for no charge and no money (other than postage). There is nothing in the

government's investigation of this case to even suggest that the Petitioner ever mentioned "money" or "payment" for tapes involving child pornography that were being forwarded through the mails.

A search of applicable case law reveals no instance where a court has ignored the plain language of the challenged Sentencing Guideline in such a manner as to arrive at the position advanced by the government and adopted by the district court. See United States v. Stanton, 973 F.2d 608 (8th Cir. 1992) (holding that sales of pornography for a profit meets the definition of "distribution"). Without a finding of pecuniary gain by the Petitioner, there should be no increase in his base offense level pursuant to U.S.S.G. §2G2.2(b)(2).

Under the reasoning of the Sixth Circuit, all individuals charged with violating 18 U.S.C. § 2252 would face an increased base offense level by mere possession of tapes with a retail value regardless of whether they had any plans to distribute such tapes. In a dubious attempt to bolster its endorsement of this guideline adjustment, the Sixth Circuit found that The Letter received pecuniary gain by Petitioner's possession of such tapes. The Sixth Circuit divined that each time a subscriber traded a tape it caused

pecuniary gain to be realized by The Letter by ensuring a continued subscriber. This tortured reasoning is simply not supported by the record. The Letter was a hobby, not a business and no fee was ever charged for the tape(s) requested.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the decision of the Sixth Circuit and vacate the decision below and remand for resentencing.

Respectfully submitted,

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VIII. APPENDIX

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1.	Opinion, United States of America v. Terry Kirkland, No. 96-5192 (6th Cir. filed February 20, 1997).....	App. 1
2.	Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc, United States of America v. Terry Kirkland, No. 96-5192 (6th Cir. April 4, 1997).....	App. 14

NOT RECOMMENDED FOR PUBLICATION
No. 96-5192
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) ON APPEAL FROM
Plaintiff-Appellee,	) THE UNITED STATES
vs.	) DISTRICT COURT
	) FOR THE MIDDLE
TERRY KIRKLAND,	) DISTRICT OF
	) TENNESSEE
Defendant-Appellant.	)

BEFORE: SILER, COLE, Circuit Judges; and VAN GRAAFEILAND, Circuit Judge.*

PER CURIAM. Defendant-Appellant Terry Kirkland ("Kirkland") appeals his sentence of thirty-four months' incarceration followed by a three-year term of supervised release imposed after his guilty plea to receipt, transportation, reproduction, possession and distribution of sexually explicit materials involving the use or depiction of minors. For the reasons that follow, we affirm the district court.

I.

In 1994, the United States Postal Inspection Service

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*The Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge for the Second Circuit, sitting by designation.

("USPIS") began an investigation of The Letter, a newsletter that catered to "gay" interests. Kirkland was identified as its publisher and distributor. Kirkland sold The Letter to subscribers for $5.00 per copy, the amount necessary to cover the costs of paper and postage. The Letter was advertised in a national magazine as a contact publication. Persons who responded to the advertisement in writing formed the basis of Kirkland's subscription list. Kirkland used that list in coordinating the trading of certain videotapes between subscribers.

USPIS agents, using the alias of "Rick Maddox," initiated correspondence with Kirkland. On July 23, 1994, Kirkland sent a letter to USPIS asking if "Maddox" was interested in trading pornographic materials of young boys. On August 17, 1994, USPIS responded affirmatively. In its written response, USPIS asked specifically about materials that involved minors. Later, on September 9, 1994, USPIS mailed another letter to Kirkland, describing 17 videotapes that "Rick Maddox" had available for trading. On September 19, 1994, Kirkland wrote to USPIS describing how he (1) facilitated trades for individuals interested in child pornography, and (2) was interested in ordering two of the seventeen tapes. The tapes that Kirkland ordered from the USPIS list were cataloged as containing young boys in various sexually explicit acts.

Kirkland and USPIS continued to correspond over the next four months. On January 12, 1995, Kirkland mailed USPIS a videotape called "Shower Boy." On February 22, 1995, in a controlled delivery, USPIS mailed Kirkland two tapes of child pornography.[1] After Kirkland retrieved the tapes, USPIS followed Kirkland from the post office to his home, where they executed a search warrant. Pursuant to the search, USPIS found thirteen videotapes that contained child pornography. While USPIS agents were executing the search warrant, Kirkland showed postal inspectors a computer listing of the videotape trading transactions and the subscribers to The Letter who had expressed an interest in the child pornography videotapes.[2]

Kirkland was arrested on May 1, 1995 and indicted on April 26, 1995, for distributing child pornography in a twelve-count indictment. Counts 1 through 4, 9 and 10 allege receipt of sexually

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1

The government contends that fourteen videotapes were found during the search. Although Kirkland admits that thirteen tapes were found at the time that the search warrant was executed, he asserts that he was in the process of duplicating one of the tapes to make a fourteenth tape. Kirkland told inspectors that he was only copying the tape at the request of one of the traders.

2

Although Kirkland denies any belief that the tapes had commercial value and that he was involved in the business of trading for money, the computer printout listed one of the tapes as having a street value of $200. Postal Inspector David Dirmeyer testified that Child pornography tapes usually have a value of between $200 to $250 for an original tape and $200 for a copy.

explicit visual depictions through the United States mails involving the use of a minor engaging in sexually explicit conduct in -violation of 18 U.S.C. § 2252(a)(2). Counts 5 through 8 allege transporting and shipping in interstate commerce by means of the United States mails visual depictions involving the use of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1). Count 11 alleges the reproduction of visual depictions of materials involving the use of a minor engaging in sexually explicit conduct for distribution in interstate commerce in violation of 18 U.S.C. § 2252(a)(2). Count 12 alleges unlawful possession of three or more videotapes containing visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B). Kirkland pleaded guilty to all twelve counts and was sentenced on January 26, 1996. He now appeals his sentence to this court.

II.

We review de novo the district court's interpretation and legal conclusions regarding application of the United States Sentencing Guidelines. United States v. Bazel, 80 F.3d 1140, 1141 (6th Cir.), cert. denied, 117 S. Ct. 210 (1996); United States v. Scott, 74 F.3d 107, 111 (6th Cir. 1996). The district court's refusal to apply a

particular guideline and the district court's factual findings are reviewed for clear error. United States v. Adu, 82 F.3d 119 (6th Cir. 1996); United States v. Scott, 74 F.3d 107, 111 (6th Cir. 1996).

III.

The district court considered each count to which Kirkland pleaded guilty as separate counts for sentencing purposes. On appeal, Kirkland argues that the counts were so similar that they should be grouped for purposes of sentencing, which would result in a lesser sentence. The government, on the other hand, maintains that although the counts were similar, each count dealt with a different victim and thus should be considered separately.

Section 3D1.2 of the United States Sentencing Guidelines provides that the offenses of multiple count indictments may be grouped for sentencing purposes in order to prevent multiple punishment for substantially similar conduct. U.S.S.G. Ch. 3, Pt. D intro. comment. The Sentencing Guidelines clearly state that "convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for

purposes of the guidelines." Id. In order to determine whether the counts should be grouped together, a court should determine whether the counts involved substantially the same harm. To determine the same harm, a court must examine whether the counts involve the same victim and the same act or transaction.[3] U.S.S.G. § 3D1.2.

In the case before this court, Kirkland knowingly distributed and received sexually explicit material involving minor children at least eleven times from the date starting on or about October 2, 1994, until February 22, 1995. On each occasion of distribution and receipt, the sexually explicit material contained depictions of different children. Kirkland argues that the district court should have grouped all twelve of these counts under U.S.S.G. § 3D 1.2 because his action of distribution had the same harm in each case and the victim that was harmed by his actions

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The term victim under § 3D1.2 "is not intended to include indirect secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim the 'victim' for the purposes of subsection...(b) is the societal interest that is harmed....Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group 'counts involving substantially the same harm." ' U.S.S.G. § 3D1.2, comment, 2. Only if there is no identifiable victim will a court deem the primary victim to be society. United States v. Ketcham, 80 F.3d 789 (3d Cir.1996).

was the same in each case; to wit, society in general. See United States v. Toler, 901 F.2d 399 (4th Cir. 1990). Kirkland's reliance on Toler is misguided and inappropriate.

In Toler, the Fourth Circuit confronted the issue of whether to group counts alleging illegal behavior in violation of 18 U.S.C. § 2252(a)(1) (shipping child pornography in interstate commerce) with counts alleging illegal behavior under 18 U.S.C. § 2423 (for transporting juveniles in interstate commerce for prostitution or sexual activity). The Fourth Circuit refused to group the offenses reasoning that the victim under § 2423 was the child, while the primary victim under § 2252(a)(1) "is the harm to the moral fabric of society at large." Toler, 901 F.2d at 403. The Toler court reasoned that the primary victim under § 2252 was society at large because the Sentencing Guidelines are specific about warranting extra punishment for those persons who are involved in the sexual exploitation of a minor under § 2423. As support, the Toler court offers a conclusory statement that the "legislative history demonstrates that its [§ 2252] primary focus (i.e., 'the nature of the interest invaded,' U.S.S.G. § 3D1.2, comment. 2) is the harm to the moral fabric of society at large." Toler, 901 F.2d at 403.

Kirkland has been convicted solely under § 2252 and his

argument that the victim under 2252 is society as concluded by the Toler court is unpersuasive. The focus of § 2252 is clearly the abused and exploited child. In addition, because the Toler opinion addresses the application of Sentencing Guidelines under two statutory provisions and Kirkland is convicted under only one, the Toler opinion can be distinguished from this case.

Most of the circuits that have addressed this specific issue disagree with the reasoning of the Fourth Circuit and instead follow the reasoning of the Eighth Circuit in United States v. Rugh, 968 F.2d 750 (8th Cir. 1992). See United States v. Ketcham, 80 F.3d 789, 793 (3d Cir. 1996) (holding that the primary victim in violations of 18 U.S.C. § 2252 is the child used in the pornography, and where there are different children, there should be no grouping of the counts); United States v. Gallardo, 915 F.2d 149 (5th Cir. 1990) (defendant's act of mailing four separate letters containing child pornography constitutes four separate violations of 18 U.S.C. § 2252(a)(1) and defendant is properly sentenced on all four counts), cert. denied, 498 U.S. 1038 (1991); United States v. Rugh, 968 F.2d 750, 756 (8th Cir. 1992) (the primary victim of 18 U.S.C. § 2252(a)(2) is the exploited child and when there are different exploited children there are different crimes); and United

States v. Cipollone, 951 F.2d 1057, 1058 (9th Cir. 1991) (when a defendant receives pictures on different occasions, a finding of separate crimes is required because it is the act of shipping or receiving the pornography that is the focus of 18 U.S.C. § 2252(a)(2)). Indeed, the Sixth Circuit, while addressing numerous similar cases concerning child pornography and sentencing, has not directly addressed the issue of grouping multiple counts dealing with sexually explicit material involving minors.

In Rugh, the defendant appealed his conviction for receiving child pornography through the mail. On appeal, he argued that the district court should have grouped the two child pornography counts for which he was convicted under U.S.S.G. § 3D1.2 because the same victim was involved in both counts. Defendant Rugh asserted the same arguments, citing to the Fourth Circuit in Toler. The Eighth Circuit reviewed the legislative history and was led to a contrary conclusion. The Eighth Circuit's reading of the Senate report determined that although there were grave concerns about the effect of child pornography on the fabric of society, the committee concluded that "the use of children as prostitutes or as the subjects of pornographic material is very harmful to both children and the society as a whole." Rugh, 968

F.2d at 755. See also S.Rep. No. 95-438, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S.C.C.A.N. 40, 43, 46.

The Eighth Circuit further determined that simply because the sexual exploitation of children in child pornography had a secondary effect on society did not in any way mitigate the fact that the primary victim in child pornography is the child.[4] Id. By exploring the extensive legislative history, the Eighth Circuit is, indeed, correct in determining that the main purpose of the Act was to protect children from sexual exploitation. Because protecting children was the main purpose of the Act, logic would follow that the primary victim would also be the exploited children and not society. We therefore conclude that the primary victim under § 2252 is the exploited child. Furthermore, were this circuit to follow

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Of deep concern to the [Senate Judiciary] Committee is the effect of child pornography on the children who become involved. Generally they are highly vulnerable children in the first place, making them easy prey.

Frequently they are victims of child abuse, or of broken homes, or of parents who just don't care. Such children have no self-pride or confidence and very little resistance. An offer of money, food, or shelter, or even a few friendly words or a show of concern can lead them unquestioning, into the hands of exploiters for the purposes of pornography or prostitution. Where there was no love or encouragement in their lives before, they finally achieve approval, encouragement and money for sexual favors.

Such encounters cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future. Indeed such children often grow up in an adult life of drugs and prostitution. Even more tragic, however, is the fact that many adults who were molested as children tend to become child molesters themselves,

thus continuing the vicious cycle. S.Rep. No. 95-438, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S.C.C.A.N. 40, 46.

the reasoning of the Fourth Circuit and establish that 18 U.S.C. § 2252 only seeks to protect society against the evils of child pornography, then any criminal statute that sought to protect society in a general sense would make society the primary victim. "Were this the case, society would be the primary victim of nearly every criminal statute." Ketchum, 80 F.3d at 793. Accordingly, because it is each of those children who are the victims of Kirkland's offenses, we find that grouping under U.S.S.G. § 3D1.2(b) is inappropriate. Id.

IV.

Kirkland's second objection to his sentence is that his base offense level was inappropriately increased by five levels pursuant to U.S.S.G. § 2G2.2(b)(2) because the district court improperly determined that his reproduction of the sexually explicit material, allegedly for his own use or for later distribution, was equal to distribution for pecuniary gain. The government maintains that Kirkland's actions, which formed the basis of his convictions, fulfill the pecuniary gain section in the Sentencing Guidelines in at least two different respects. First, the government asserts that because each of the tapes that Kirkland was collecting had a street value

between $200 to $250, he enjoyed a pecuniary gain simply by having those tapes in his possession. Second, the government asserts that Kirkland enjoyed a pecuniary gain, even though there was no charge for facilitating the trades, because his initial contact with each of his trading customers before facilitating the trades was from his publication, The Letter, for which he charged each subscriber five dollars. U.S.S.G. § 2G2.2(b)(2) states that if the offense outlined in § 2G2.2 involved distribution that the sentence will be increased by no less than five levels. The Application Notes to U.S.S.G. § 2G2.2(b)(2) provide that "'distribution,' as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." With that definition clearly established, it becomes obvious that Kirkland's arguments are without merit.

Kirkland has admitted that he duplicated tapes prior to sending them out and that he did so for the purpose of distributing them at a later date. Under de novo review, we find that Kirkland's actions of duplicating the tapes is an act of production as described by the Sentencing Guidelines. We also find that Kirkland's possession of these tapes was for the sole purpose of distributing them to his customers. Kirkland admitted that he did not need to

have an order placed for a particular title when he duplicated a tape. He merely copied the tapes so that he could have them for distribution at a later date. Before each tape was mailed to a customer, but after it had been duplicated, Kirkland assumed a pecuniary gain as each copied tape had a street value of approximately $200. Furthermore, Kirkland incurred pecuniary gain each time a subscriber of The Letter later traded the illicit tapes, ensuring that the particular trader would continue to subscribe to The Letter. Kirkland's actions clearly fit within the parameters of § 2G2.2(b)(2); thus, the district court was proper in increasing Kirkland's base offense level by five levels.

V.

For the foregoing reasons, we **affirm** the district court's order sentencing defendant to thirty four months' incarceration and three years' supervised release.

NOT RECOMMENDED FOR PUBLICATION
No. 96-5192
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) ON APPEAL FROM
Plaintiff-Appellee,	) THE UNITED STATES
	) DISTRICT COURT
vs.	) FOR THE MIDDLE
	) DISTRICT OF
TERRY KIRKLAND,	)TENNESSEE
	)
Defendant-Appellant.	)

BEFORE: SILER, COLE, Circuit Judges; and VAN GRAAFEILAND, Circuit Judge.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk